



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>

July 11, 2003

Ref: 8ENF-T

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Corporation Company
Registered Agent for JDN Intermountain Holding, Inc.
1675 Broadway
Denver, CO 80202

Re: Notice of Proposed Assessment of Civil Penalty
Docket No. **CWA-08-2003-0073**
Facility Permit No. COR-033411

Dear Registered Agent:

Enclosed is a document entitled Penalty Complaint and Notice of Opportunity for Hearing ("Complaint"). The United States Environmental Protection Agency ("EPA") is issuing this Complaint against JDN Intermountain Development Pioneer Hills, LLC, ("Pioneer Hills") pursuant to section 309 of the Clean Water Act ("Act"), 33 U.S.C. § 1319. In the Complaint, EPA alleges that Pioneer Hills has violated section 301(a) of the Act, 33 U.S.C. § 1311(a), and the storm water requirements specified in Colorado Discharge Permit System ("CDPS") permit No. COR-030000. The Complaint proposes that a penalty of \$125,000 be assessed against Pioneer Hills for these violations.

You have the right to a hearing to contest the factual allegations in the Complaint or the appropriateness of the proposed penalty. We have enclosed a copy of 40 C.F.R. part 22, which identifies the procedures EPA follows in administrative civil penalty assessments. Please note the requirements for an answer to the Complaint in 40 C.F.R. § 22.15.

If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file an answer within thirty (30) days of your receipt of the enclosed Complaint to the EPA Region VIII Hearing Clerk at the following address:

Regional Hearing Clerk (8RC)
U.S. EPA, Region VIII
999 18th Street, Suite 300
Denver, Colorado 80202-2466



Printed on Recycled Paper

If you do not file an answer within 30 days [see 40 C.F.R. § 22.15(d)], you may be found in default. A default judgment may impose the full penalty proposed in the Complaint of \$125,000.

EPA encourages the consideration of Supplemental Environmental Projects (SEPs) in conjunction with civil penalties, in the settlement of civil enforcement cases. In case you are interested in this possibility, we have enclosed a copy of the EPA policy that describes the possibilities and limitations of SEPs in such matters. An agreement to perform a SEP may result in a lower cash penalty amount.

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the Act and applicable regulations (See 40 C.F.R. § 22.18). If a mutually satisfactory settlement can be reached, it will be formalized in a consent agreement signed by you and the delegated authority for EPA. Upon final approval of the consent agreement by the Regional Judicial Officer, Pioneer Hills will be bound by the terms of the consent agreement and will waive its right to a hearing on, and judicial appeal of, the agreed upon civil penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA.

A Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet, containing information on compliance assistance resources and tools available to small businesses, is enclosed with this letter. SBREFA does not eliminate your responsibility to comply with the Act and respond to this Complaint, nor does it create any new rights or defenses under law.

If you have any questions regarding this letter, the enclosed Complaint, or any other matters pertinent to compliance with the Act, the most knowledgeable people on my staff regarding these matters are Lee Hanley, Technical Enforcement, at (303) 312-6555 or David J. Janik, Supervisory Enforcement Attorney, at (303) 312-6917. If you are represented by an attorney, or to request a settlement conference, please call Mr. Janik. Please note that arranging for a settlement meeting does not relieve you of the need to file a timely answer to EPA's Complaint.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

1. Penalty Complaint and Notice of Opportunity for Hearing
2. Consolidated Rules of Practice (40 C.F.R. Part 22)
3. Supplemental Environmental Projects Policy
4. Small Business Regulatory Enforcement and Fairness Act Information
5. Memo from CDPHE

cc: Tina Artemis, Regional Hearing Clerk
Mark Pifher, CDPHE

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Docket No. **CWA-08-2003-0073**

In the Matter of:

JDN Intermountain Holdings, Inc.
a Colorado corporation,

Respondent.

)
) **PENALTY COMPLAINT AND NOTICE OF**
) **OPPORTUNITY FOR HEARING**
)
)
)

INTRODUCTION

1. This civil administrative enforcement action is authorized by Congress in section 309(g) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA or the Act). 33 U.S.C. § 1319(g). The Environmental Protection Agency (EPA) regulations authorized by the statute are set out in part 122 of title 40 of the Code of Federal Regulations (C.F.R.), and violations of the statute, permits or EPA regulations constitute violations of that section of the Act. The rules for this proceeding are the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (“Rules of Practice”),” 40 C.F.R. part 22, a copy of which is enclosed.

2. The undersigned EPA official has been properly delegated the authority to issue this action. EPA has consulted with the State as required by the Act. 33 U.S.C. § 1319(g)(1).

3. EPA alleges that Respondent has violated the Act, permit and/or regulations and proposes the assessment of a civil penalty, as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact stated (alleged) by EPA in the complaint, (2) the grounds for any legal defense, or (3) the appropriateness of the proposed penalty.

5. To disagree with the complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk (999 18th Street; Suite 300 (8RC); Denver, Colorado 80202) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in the answer. **FAILURE TO FILE**

1 **AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE**
2 **RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED**
3 **PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE**
4 **PENALTY PROPOSED IN THE COMPLAINT, OR UP TO THE MAXIMUM**
5 **AUTHORIZED BY THE ACT.**

6
7 **QUICK RESOLUTION**
8

9 6. Respondent may resolve this proceeding at any time by paying the penalty amount
10 proposed in the complaint. Such payment need not contain any response to, or admission of, the
11 allegations in the complaint. Such payment constitutes a waiver of Respondent's right to contest the
12 allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full
13 explanation of the quick resolution process.
14

15 **SETTLEMENT NEGOTIATIONS**
16

17 7. EPA encourages discussing whether cases can be settled through informal settlement
18 conferences. If you want to pursue the possibility of settling this matter, or have any other
19 questions, contact David J. Janik, Supervisory Enforcement Attorney, at [1-800-227-8917 ;
20 extension 6917 or 303-312-6917] or the address below. **Please note that calling the attorney or**
21 **requesting a settlement conference does NOT delay the running of the 30 day period for filing**
22 **an answer and requesting a hearing.**
23

24 **GENERAL ALLEGATIONS**
25

26 The following general allegations apply to all times relevant to this action, and to each count
27 of this complaint:
28

29 8. In order to restore and maintain the integrity of the nation's water, section 301(a) of the
30 Act prohibits the discharge of pollutants into navigable waters of the United States, unless it is in
31 compliance with a permit issued pursuant to the Act. 33 U.S.C. § 1311(a).
32

33 9. Section 402 of the Act establishes a National Pollutant Discharge Elimination System
34 (NPDES) program, administered by EPA or State, to permit discharges into navigable waters,
35 subject to specific terms and conditions. 33 U.S.C. § 1342.
36

37 10. The Act requires that a discharge of storm water associated with an industrial activity to
38 navigable waters must comply with the requirements of an NPDES permit.
39 33 U.S.C. § 1342(p).
40
41

1 11. The Act authorized, and EPA issued, regulations that further define requirements for
2 NPDES permits for storm water discharges. 33 U.S.C. § 1318, § 1342(p). The regulations are
3 found at 40 C.F.R. part 122.
4

5 12. EPA regulations define discharges associated with industrial activity to include
6 construction activity. 40 C.F.R. § 122.26(b)(14)(x).
7

8 13. EPA regulations require each person who discharges storm water associated with
9 industrial activity to either apply for an individual permit or seek coverage under an existing and
10 lawful general permit. 40 C.F.R. § 122.26(c).
11

12 14. The State of Colorado has lawfully issued a general permit, under the authority of State
13 law and the Act, which authorizes the discharge of storm water associated with construction
14 activities, if done in compliance with the conditions of the permit. The State of Colorado issued
15 permit no. COR- 033411 to JDN Intermountain Development Pioneer Hills, LLC on August 31,
16 2000, which provided coverage under COR-030000. Colorado permit no. COR-030000; attached
17 as exhibit A (“permit”).
18

19 15. The permit requires, among other things, that a person discharging pollutants develop
20 and implement an adequate storm water management plan (SWMP), conduct regular specified
21 storm water inspections, and implement best management practices (“BMPs”), etc. BMPs include
22 structural controls (such as sediment ponds and silt fences) and management practices (such as a
23 dedicated concrete washout area and street sweeping).
24

25 16. Respondent is a corporation, incorporated in the State of Colorado, and doing business
26 in the State of Colorado.
27

28 17. Respondent is a “person” within the meaning of section 502(5) of the Act, and therefore
29 subject to the requirements of the statute and/or regulations. 33 U.S.C. § 1362(5).
30

31 18. Respondent owns or was engaged in construction activities at a facility located at
32 Pioneer Hills Development, Parker and Chambers Road, Aurora, CO, (“facility”).
33

34 19. Respondent engaged in construction activities at the facility at all times relevant to this
35 action.
36

37 20. Respondent is therefore engaged in an “industrial activity” as defined by EPA
38 regulations. 40 C.F.R. § 122.26(b)(14).
39

40 21. Storm water, snow melt, surface drainage and run off water leaves Respondent’s facility
41 and goes into wetland areas and unnamed drainage.
42

22. The run off and drainage from Respondent's facility is "storm water" as defined by EPA regulations. 40 C.F.R. § 122.26(b)(13).

23. Storm water contains “pollutants” as defined by the Act. 33 U.S.C. § 1362(6).

24. The wetlands and unnamed drainage are tributary to Piney Creek and the Cherry Creek Reservoir which are “navigable waters” and “waters of the United States,” as defined by the Act and EPA regulations, respectively. 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2.

25. Respondent's storm water runoff is the "discharge of a pollutant" as defined by EPA regulations. 40 C.F.R. § 122.(b)(14)(x).

26. An authorized EPA employee entered the facility with the consent of Respondent on May 31, 2002, to inspect it for compliance with the statute, permit and regulations. The counts below outline violations confirmed by the inspector.

27. Construction activities disturbing over five acres commenced at the facility on November 21, 2001.

28. Section 301 of the Act and the storm water regulations at 40 C.F.R. § 122.26 require that a stormwater permit be obtained for construction activity including clearing, grading and excavation disturbing at least five acres.

COUNT 1

29. As of the date of the inspection, Respondent had not developed a SWMP.

30. Respondent's failure to develop a SWMP at least 10 days prior to the commencement of construction, as required by the permit, constitutes violations of the Act. 33 U.S.C. § 1319, § 1342.

COUNT 2

31. The permit requires Respondent to implement best management practices (BMPs) in order to minimize the impact of Respondent's construction activities on waters of the U.S. At the time of that inspection, the following BMPs were not in place or were not being implemented: no BMP was in place to contain fuel spills, no vehicle track out pad was in place at Chambers and Joplin and no vehicle track out pad was present at the Parker Road construction entrance, no BMPs were in place to protect storm drain inlets, and the BMPs adjacent to the wetlands area were not properly maintained and sediment was entering the wetlands area.

32. Respondent's failure to implement BMPs as required by the permit constitutes violations the Act. 33 U.S.C. § 1319, § 1342(p).

PROPOSED CIVIL PENALTY

33. The Act authorizes the assessment of a civil penalty of up to \$27, 500 per day, for each violation of the Act. 33 U.S.C. § 1319(g). The Act requires EPA to take into account the following factors in assessing a civil penalty: the nature, circumstances, extent and gravity of the violation; Respondent's prior compliance history of such violations; Respondent's culpability for the violation; any economic benefit or savings gained from the violation; and other factors that justice may require.

34. In light of the statutory factors and the specific facts of this case, EPA proposes that a penalty of \$125,000 be assessed against Respondent for the violations alleged above, as explained below:

Nature, Circumstances, Extent, and Gravity of Violations

Respondent had control of storm water management at the facility beginning in November 2001. The June 10, 2002 inspection by the EPA found that a SWMP was not available at the site. The EPA inspection revealed the following BMPs were not in place or were not being adequately implemented: vehicle track out pads, BMPs to control sediment runoff into the wetlands area, inadequate protection at storm drain inlets.

Prior Compliance History

This Complaint is the first enforcement actions EPA Region 8 has issued to Respondent requiring compliance with the applicable storm water regulations.

Degree of Culpability

Respondent had a copy of the storm water permit, and should have been aware of all the requirements therein.

Economic Benefit

An economic benefit was experienced by Respondent for failure to comply with the storm water permit. Specifically, Respondent benefitted by not spending the required funds to implement adequate sediment control, adequate storm drain inlet protection, and vehicle track out pad(s) by June 30, 2002, and to develop and maintain a SWMP on site from the start of the construction activity. Additional information may be collected in regard to this factor supporting a greater penalty adjustment.

Ability to Pay

EPA did not reduce the proposed penalty due to this factor, but will consider any new information Respondent may present regarding Respondent's ability to pay the penalty proposed in this Complaint.

Other Matters that Justice may Require

No adjustments made regarding these factors at this time.

35. As required by the Act, prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held. 33 U.S.C. § 1319(g)(4).

36. The ALJ is not bound by EPA's penalty policy or the penalty proposed by EPA, and may assess a penalty above the proposed amount, up to the \$27,500 per day per violation authorized in the statute.

To discuss settlement or ask any questions you may have about this case or process, please contact David J. Janik, Supervisory Enforcement Attorney, at 303-312-6917, or the address below:

United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and
Environmental Justice, Complainant
999 18th Street, Suite 300 (ENF-L)
Denver, CO 80202

Date: 7/9/03

By: SIGNED
Carol Rushin
Assistant Regional Administrator

SIGNED
David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE
REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JULY 11, 2003.